Azman bin Mahmood & Anor v SJ Securities Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()-75–11 OF 2011(W)
RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), AHMAD MAAROP, HASAN LAH AND ZALEHA ZAHARI FCJJ
3 AUGUST 2012

Securities — Share trading accounts — Contra losses — Stock — Dealer assigned by stockbroking company to handle appellants' accounts traded without latter's authority incurring losses — Whether appellants liable to indemnify company for losses — Whether appellants' three-month delay in complaining about contra losses material — Whether delay adequately explained — Whether delay per se created estoppel in company's favour or created belief which caused company to alter its position — Whether company negligent to allow dealer to misuse accounts

The respondent stockbroking company had sued the appellants in the High Court to recover losses incurred on their trading accounts ('the accounts') with it. Prior to the filing of the action, the respondent had issued the appellants contra statements showing losses in the accounts and shortly thereafter it force-sold the shares that had been purchased under the accounts and used the proceeds to off-set the losses. Three months after having received the respondent's contra statements, the first appellant, who operated the accounts both on his own and the second defendant's behalf, met with the respondent's executive director to complain that the dealer ('Megat') whom the respondent had assigned to the appellants had misused the accounts to trade without the appellants' authority. The first appellant followed up the meeting with a written complaint about the matter and requested the respondent to suspend the accounts. When the respondent replied that the appellants' complaint was unsubstantiated, the appellants forwarded to the respondent two purported letters from Megat admitting he had traded on the accounts without the appellants' approval. As a result of the letters, Megat was dismissed from the respondent's employ for misconduct but nevertheless the respondent pursued its action against the appellants for recovery of the share trading losses. The appellants counterclaimed, inter alia, for losses arising from the respondent's negligence in managing the accounts as well as for the return of monies the respondent had used from the accounts to set off its losses. These were monies the appellants had earned from their own trading activities. The High Court dismissed the respondent's claim and allowed the appellants' counterclaim holding, inter alia, that Megat's oral and documentary evidence clearly showed he had used the accounts to trade without the appellants' instructions; that the respondent's officers who testified could not explain material errors in the contra notes and statements and that the respondent was negligent in allowing

Megat to misuse the accounts. The Court of Appeal reversed the High Court's decision holding that: (i) the appellants were estopped from saying Megat used the accounts to trade without their knowledge because the evidence showed they were aware of his activities but remained silent and did nothing; and (ii) the respondent's contractual right to be indemnified by the appellants for all trading losses remained intact. The appellants were granted leave to appeal to the Federal Court.

Held, allowing the appeal with costs, setting aside the orders of the Court of Appeal and reinstating the orders of the High Court:

(1) The Court of Appeal's finding that the appellants had knowledge of the unauthorised transactions could not be endorsed. This was a clear misdirection as the material evidence recorded clearly showed the transactions were unauthorised. Megat was dismissed by the respondent from its employment for having manipulated the accounts without the first appellant's knowledge (see para 28).

(2) The undisputed facts clearly showed the appellants were not quiet when they knew of the unauthorised transactions in their trading account. The first appellant met up with the respondent's executive director on 24 February 1997 and wrote a letter on 27 February 1997 stating their position on the irregularities in their accounts (see para 18).

(3) Based on the clear provisions of the contract note no time frame had been set to impose liability on the appellants for delay. The issue of delay was a matter to be treated with severity only in appropriate circumstances. If there was a delay it was adequately explained by the first appellant that he was overseas from October 1996 till January 1997. Hence, delay per se was not enough to create an estoppel in the respondent's favour. The respondent also failed to show how the appellants' delay in replying to its contra statements had encouraged a belief on its part and that having relied on that belief the respondent had altered its position (see para 30).

(4) The trial judge had properly evaluated the evidence and asked herself the right questions. The respondent failed to prove its loss and the appellants, in turn, had shown that the respondent was negligent to allow Megat to misuse the accounts (see paras 31–32).

Obiter:

(5) In order to satisfy its obligations, brokerage firms must show not only that they had in place supervisory and compliance rules and procedure but also that they had effectively implemented and enforced their rules and procedures. Shifting the burden and imposing liability on the

innocent trader by reason of unauthorised transactions conducted by their employees would cause substantial harm to the innocent trader (see para 33).

[Bahasa Malaysia summary

Syarikat broker saham responden telah menyaman perayu-perayu di Mahkamah Tinggi untuk mendapat balik kerugian yang ditanggung oleh akaun-akaun dagangan mereka ('akaun-akaun tersebut') dengannya. Sebelum memfailkan tindakan ini, responden telah mengeluarkan kenyataan-kenyataan kontra menunjukkan kerugian-kerugian dalam akaun-akaun tersebut dan sejurus selepas itu ia telah memaksa jual saham-saham yang telah dibeli di bawah akaun-akaun tersebut dan menggunakan hasil kutipan untuk menlak kerugian-kerugian tersebut. Tiga bulan selepas menerima kenyataan-kenyataan kontra itu, perayu pertama, yang mengendalikan akaun-akaun tersebut bagi dirinya sendiri dan bagi pihak defendan kedua, telah berjumpa dengan pengarah eksekutif responden untuk mengadu bahawa peniaga tersebut ('Megat') yang mana responden telah ditugaskan kepada perayu-perayu telah menyalahgunakan akaun-akaun tersebut untuk berniaga tanpa kebenaran perayu-perayu. Perayu pertama telah menyusul selepas mesyuarat itu dengan aduan bertulis berhubung perkara itu dan meminta responden menggantung akaun-akaun tersebut. Apabila responden menjawab bahawa aduan perayu-perayu tidak boleh disahkan, perayu-perayu tersebut telah mengemukakan kepada responden dua surat daripada Megat yang mengaku dia telah berniaga menggunakan akaun-akaun tersebut tanpa kebenaran perayu-perayu. Akibat daripada surat-surat tersebut, Megat telah dipecat daripada bekerja dengan responden kerana salah laku tetapi begitu pun responden telah memulakan tindakannya terhadap perayu-perayu untuk mendapat balik kerugian-kerugian saham dagangan. Perayu-perayu telah menuntut balas, antara lain, kerana kerugian yang timbul daripada kecuaian responden dalam menguruskan akaun-akaun tersebut dan juga untuk mendapat balik wang yang telah digunakan responden daripada akaun-akaun tersebut untuk membayar kerugiannya. Wang tersebut merupakan wang yang telah diperoleh oleh perayu-perayu daripada aktiviti-aktiviti dagangan mereka sendiri. Mahkamah Tinggi telah menolak tuntutan responden dan membenarkan tuntutan balas perayu-perayu dengan memutuskan, antara lain, bahawa keterangan lisan dan dokumentar Megat jelas menunjukkan bahawa dia telah menggunakan akaun-akaun tersebut untuk berniaga tanpa arahan perayu-perayu tersebut; bahawa pegawai-pegawai responden yang memberi keterangan tidak menjelaskan kesilapan besar dalam nota-nota dan kenyataan-kenyataan kontra tersebut dan bahawa responden cuai kerana membenarkan Megat menyalahgunakan akaun-akaun tersebut. Mahkamah Rayuan telah mengakas keputusan Mahkamah Tinggi dengan memutuskan bahawa: (i) perayu-perayu diestop daripada mengatakan bahawa mereka sedar tentang aktiviti-aktivitinya tetapi berdiam diri dan tidak berbuat apa-apa; dan (ii) hak kontraktual responden telah dibayar ganti rugi oleh perayu-perayu

untuk semua kerugian dagangan yang wujud. Perayu-perayu tersebut telah diberi kebenaran untuk merayu ke Mahkamah Persekutuan.

Diputuskan, sebulat suara membenarkan rayuan dengan kos, mengetepikan perintah-perintah Mahkamah Rayuan dan mengekalkan perintah-perintah Mahkamah Tinggi:

(1) Penemuan Mahkamah Rayuan bahawa perayu-perayu mempunyai pengetahuan tentang transaksi-transaksi yang tidak dibenarkan itu tidak boleh diindorskan. Ini jelas suatu salah arah kerana keterangan material yang direkodkan jelas menunjukkan transaksi-transaksi tersebut tidak dibenarkan. Megat telah dipecat oleh responden daripada bekerja dengannya kerana memanipulasikan akaun-akaun tersebut tanpa pengetahuan perayu pertama (lihat perenggan 28).

(2) Fakta-fakta yang tidak dipertikaikan jelas menunjukkan perayu-perayu tersebut tidak berdiam diri apabila mereka mengetahui tentang transaksi-transaksi yang tidak dibenarkan itu dalam akaun dagangan mereka. Perayu pertama telah berjumpa dengan pengarah eksekutif responden pada 24 Februari 1997 dan telah menulis surat pada 27 Februari 1997 menyatakan kedudukan mereka berhubung akaun-akaun tersebut yang tidak teratur (lihat perenggan 18).

(3) Berdasarkan peruntukan-peruntukan yang jelas pada nota kontra itu tiada jangka masa ditetapkan untuk mengenakan liabiliti ke atas perayu-perayu kerana kelewatan. Isu kelewatan adalah perkara yang perlu dianggap penting hanya dalam keadaan tertentu. Jika terdapat kelewatan ia telah dijelaskan oleh perayu pertama bahawa dia berada di luar negara dari Oktober 1996 hingga Januari 1997. Justeru itu, kelewatan per se tidak mencukupi untuk membentuk estopel bagi menyebelahi responden. Responden juga gagal menunjukkan bagaimana kelewatan perayu-perayu tersebut menjawab kenyataan-kenyataan kontranya telah menggalakkan kepercayaan di pihaknya dan bahawa dengan bergantung pada kepercayaan tersebut responden telah mengubah kedudukannya (lihat perenggan 30).

(4) Hakim perbicaraan telah menilai sewajarnya keterangan tersebut dan bertanyakan soalan-soalan yang betul. Responden telah gagal membuktikan kerugiannya dan perayu-perayu tersebut, sebaliknya, telah menunjukkan bahawa responden telah cuai kerana membenarkan Megat menyalahgunakan akaun-akaun tersebut (lihat perenggan 31–32).

Obiter:

(5) Bagi tujuan memenuhi obligasinya, firma broker bukan sahaja menunjukkan bahawa bukan sahaja terdapat peraturan dan prosedur pengawalseliaan dan pematuhan malah terdapat juga pelaksanaan dan

penguatkuasaan berkesan terhadap peraturan dan prosedur tersebut. Dengan mengalih beban dan meletakkan liabiliti ke atas peniaga yang jujur atas sebab transaksi-transaksi yang tidak dibenarkan tersebut yang telah dilakukan oleh pekerja-pekerja mereka akan menjejaskan peniaga yang jujur (lihat perenggan 33).]

Notes

For cases on contra losses, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 939–943.

Cases referred to

Attorney General of Hong Kong And Anor v Humphreys Estate (Queens Gardens) Ltd [1987] 1 AC 114, PC (refd)

Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165b, PC (refd)

Dato' Shazryl Eskay bin Abdullah v Merong Mahawangsa Sdn Bhd & Dato' Yahya bin A Jalil [2011] MLJU 486 (refd)

Gan Yook Chin and Anor v Lee Ing Chin And Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Greenwood v Martins Bank, Ltd [1933] AC 51 (refd)

Inter-Pacific Securities SB v Fong Ping Yuen [1999] MLJU 178; [1999] 1 LNS 206, HC (refd)

Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd [2009] 6 MLJ 450; [2009] 6 CLJ 626, CA (refd)

M'Kenzie (Pauper) v British Linen Company [1881] 6 AC 82 (refd)

Majlis Perbandaran Ampang Jaya v Steven Phao Cheng Loon & 81 Others [2006] MLJU 37, FC (refd)

Montagu Stanley and Co v JC Solomon, Ltd [1932] 2 KBD 287, CA (refd)

Multar v Lim Kim Chet and Anor [1982] 1 MLJ 184; [1982] CLJ (Rep) 237, FC (refd)

Nationwide Building Society v Lewis [1998] Ch 482, CA (refd)

PC and Gan Yook Chin & Anor v Lee Ing Chin & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309 (refd)

RHB-Cathay Securities Pte Ltd v Ibrahim Khan and other actions [1999] 3 SLR 464, HC (refd)

Sarawak Securities Sdn Bhd v Andy Chan Chaw Guan; Fabian Eh Ng (Third Party) [2000] MLJU 406; [2000] 7 CLJ 364, HC (refd)

Sundram a/l Ramasamy v Arujunan a/l Arumugam & Anor [1994] 4 CLJ 300, SC (refd)

Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2011] 4 MLJ 805; [2010] 1 CLJ 484, CA (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Appeal from: Civil Appeal No W–02–752 of 2007 (Court of Appeal, Putrajaya)

Lambert Rasa-Ratnam (Moh Kok Wai, Mong Chung Seng and Bella Chu with him) (Moh Kok Wai) for the appellants.
Harjinder Kaur (Rizal Zulkeply and Yau Her Lerk with him) (Rizal & Co) for the respondent.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the Court of Appeal on the 16 November 2010, in allowing the respondent's appeal against the High Court decision. Leave to appeal was granted by this court on 2 November 2011 and the questions of law framed for determination in this appeal are:

> Question 1
>
> Whether an inference based on policy can properly be drawn to hold a customer liable for an admittedly unauthorized share transaction, because he did not immediately lodge a complaint with the firm of stock-brokers;
>
> Question 2
>
> Whether estoppel can properly be applied to.create liability, on the ground it was not immediately notified, for a transaction that is admittedly unauthorized although no inducement, reliance or alteration of position by the delay is shown;
>
> Question 3
>
> Whether a customer can properly be held liable on his indemnity for losses alleged to have resulted from a transaction, although the loss claimed has not been proved.

[2] The appellants are the defendants and the respondent is the plaintiff. For convenience, parties will be referred to as the plaintiff and defendants as in the trial court.

BACKGROUND FACTS

[3] The facts which form the background of this appeal can be briefly set out as follows.

[4] The plaintiff in this action is a stock broking company and a member of the Kuala Lumpur stock exchange. In November 1993 and February 1994, the

first and second defendants opened trading accounts (accounts) respectively with the plaintiff to trade shares on the Kuala Lumpur stock exchange. The first defendant as an individual and the director for the secod defendant company was the person authorised to deal with his and the second defendant's account.

[5] The accounts are governed by thes terms set out in the plaintiff's standard account application form which include, inter alia, as follows:

(a) The defendants undertake to abide, by the Rules and Regulations of the Kuala Lumpur Stock Exchange relating to purchase and sale of share listed with the bourse;

(b) The defendants undertake to make immediate payment for the delivery of stocks and/or shares purchased on their behalf;

(c) The defendants undertake to promptly deliver to the plaintiff any the shares sold on their behalf;

(d) The defendants authorise the plaintiff to deal with the share purchased for the account of the defendants, which has not been paid for, in any way deemed fit by the plaintiff;

(e) The defendants undertake to indemnify the plaintiff against all losses resulting from the failure of the defendants in complying with the covenant as stipulated in the agreement.

[6] The initial dealer assigned by the plaintiff for the defendants' accounts was Baharum Mohd Amin. In or around October 1995, the plaintiff assigned another employee known as Megat Makhtar ('Megat') as the dealer for the accounts.

[7] In November 1996, the defendants received contra statements issued by the plaintiff. The first defendant found that shares were being traded in the accounts in an unauthorised manner. The first defendant contacted Megat, to which Megat promised to regularise the accounts. However by a notice dated January 1997 the plaintiff's Credit Control Department had issued a notice to the defendants concerning the outstanding sums. The statement showed the accounts had not been regularised and losses were incurred. As a result of this, the plaintiff in turn had force sold the shares that were purchased and used the proceeds to set off the losses.

[8] The first defendant on 24 February 1997 met with the executive director of the plaintiff complaining on the unauthorised transactions. On 27 February 1997 the first defendant made a written complain stating their position as to the unauthorised transaction in their accounts and requested for suspension of the accounts.

[9] The plaintiff replied through their solicitors via two letters both dated 12 December 1997 to the defendants stating that the complaint made was unsubstantiated and further demanded payment for the contra losses. In furtherance to this, the defendants replied through their solicitors via letter dated 13 February 1998 enclosing two purported letters from the Megat to the Board of Directors of the plaintiff acknowledging that the unauthorised transactions were carried out without the approval of the defendants.

[10] In consequence of this, the plaintiff, dismissed Megat from his employment for misconduct on the 22 April 1998. The dismissal was in tandem with the findings of a domestic inquiry conducted by the plaintiff that found Megat guilty of misusing the defendants' accounts which resulted in the losses.

[11] Notwithstanding the above, the plaintiff commenced this action against the first and second defendants on 16 July 1998 and 17 July 1998 respectively, for recovery of losses from the share transactions.

[12] The particulars of the plaintiff's claim reflected that defendants' accounts suffered losses amounting to RM846,092.13 which include contra loss totalling RM694,493.66. In respect of the second defendant's account the contra loss totalled at RM26,767.35.

[13] The defendants in turn counterclaimed for, inter alia, the return of the proceeds in the accounts that were set off earlier to recover the losses as a result of the share transactions, and losses arising from plaintiff's negligence in handling and managing their accounts.

[14] The two actions commenced by the plaintiff were subsequently consolidated.

THE HIGH COURT

[15] On 26 June 2007, the High Court, after full trial, dismissed the plaintiff's claim and allowed the defendants' counterclaim in part. In doing so the learned judge held, inter alia, that:

(a) PW1 and the other two witnesses (PW2–PW3) who testified were viewed as witnesses who did not have knowledge of the transaction in the accounts. PW1 testified that the contract notes and the contra statements contained errors and material differences which could not be explained by them;

(b) Megat (DW1) had caused the losses in the defendants' accounts as a result of the said share transactions being made without the defendants'

knowledge. This was fortified by his own testimony in court and confession in writing (exh 'P38') and via statutory declaration (exhs 'D62' and 'D63'). Megat admitted that he used the defendants' accounts without instructions by way of a 'married deal'. Megat also admitted in writing (exh 'D60' and 'D61') that he would indemnify the defendants' losses in the trading accounts;

(c) the plaintiff failed to produce the fax transmission or phone recording for the transaction in dispute. That being the case an adverse presumption under s 114(g) of the Evidence Act 1950 was invoked against the plaintiff; and

(d) the plaintiff was negligent in allowing Megat to misuse the accounts and, the defendants had proved their counterclaim that the plaintiff had force sold the shares in their accounts and utilised the proceeds to set off the losses incurred from the share transactions.

COURT OF APPEAL

[16] Aggrieved by the High Court decision the plaintiff appealed and the Court of Appeal unanimously allowed the appeal on 16 November 2010 and set aside the judgment of the High Court and entered judgment for the plaintiff with costs. The Court of Appeal held the following:

(a) the losses suffered in the trading accounts were apparent. Whether the losses were contra losses or whether the transactions were 'married deals' are immaterial as the defendants had contractually agreed to indemnify the plaintiff against all losses;

(b) the defendants contention that Megat (DW1) acted without the first defendant's instruction or knowledge to be disingenuous. Megat's testimony (referring to Megat Makthar's Q & A Nos 57–59) clearly shows that the first defendant (DW2) had knowledge of the said share transactions. The defendants own evidence clearly shows that they had agreed for the trades to be booked under their accounts. The defendants had knowledge of the transactions but remained silent and did not take any action. Hence, the undeniable inference that can be drawn is that the defendants are therefore estopped from denying the transactions;

(c) since records such as the contract notes and statement of accounts were issued independent of the dealer, the unauthorised trades could not remain hidden and would be discovered by the account holder eventually. Having discovered the evidence of such rogue trade at a later date, the account holder was expected to take up a complaint with the plaintiff as required by the agreement. Their failure to do so further

endorses the fact that there was a private arrangement between Megat and the defendants to allow Megat to use their account;

(d) the plaintiff's contractual rights to be indemnified for all losses against the defendants remained intact. Reference was made to the case of *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184; [1982] CLJ (Rep) 237 (FC); *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 450; [2009] 6 CLJ 626 (CA); *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165b (PC); and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC); and

(e) traders are deemed to have accepted and ratified rogue trades and trading on their trading accounts if they did not lodge a complaint with whosoever has authority over such trader.

SUBMISSIONS

[17] Before us learned counsel for the defendants submitted that the Court of Appeal drew a wrong inference based on the evidence recorded that the transactions which were conducted by DW1 was authorised.The Court of Appeal also drew a wrong inference that the defendants had knowledge of the transactions and in the interim had accepted the transactions. To this, learned counsel submitted that there was direct evidence adduced during the trial on the issue that the transactions were not authorised by the defendants' and Megat had manipulated the accounts. The defendants counsel submited that whether an inference could properly be drawn in any given matter was a question of fact based on evidence, not policy. The defendants' counsel further submits that the inference drawn by the Court of Appeal based on policy was wrong. In support thereof the defendants' counsel referred to the case of *Sundram a/l Ramasamy v Arujunan a/l Arumugam & Anor* , SC; [1994] 4 CLJ 300.

[18] The defendants counsel further submitted that the undisputed evidence clearly showed that the defendants did not remain silent on the unauthorised transactions. Learned counsel vehemently argued that the Court of Appeal was wrong in holding that the defendants were indeed silent and they are therefore estopped from denying the unauthorised transactions. Learned counsel submitted that the defendant did inform the plaintiff, albeit at a later date. He submitted that there was an explanation for the delay and delay per se did not create estoppel. He submitted that the plaintiff must prove that the delay created had encouraged a belief (on the part of the plaintiff) that the transactions were authorised and the plaintiff relied on that belief or encouragement and as a result of this reliance, the plaintiff altered its position. Learned counsel for the defendants have studiously taken us through some of

A the relevant cases which include *Attorney General of Hong Kong and Another v Humphreys Estate (Queen's Gardens) Ltd* [1987] 1 AC 114 (PC); *Nationwide Building Society v Lewis* , CA; [1998] Ch 482.

B **[19]** As for the issue of loss and indemnity, learned counsel for the defendants submitted that the plaintiff had plainly failed to prove the loss it claimed. It was manifestly demonstrated before the trial judge that the plaintiff's witnesses were unable to explain the obvious material errors and discrepancies iri the contract notes and contra statements. In amplification of this learned counsel submitted that the plaintiff had no cause of action against C the defendants on the indemnity. On this point learned counsel submitted the case of *Montagu Stanley and Co v JC Solomon, Ltd, CA* [1932] 2 KBD 287.

[20] Learned counsel for the plaintiff conversely submitted that where an D account holder of a stock broking trading account had agreed to be liable for losses suffered in their trading account, the account holder's failure to object or question the unauthorised transactions would constitute an estoppel at law which precluded the account holder from relying on a defence that the transaction was not authorised. The plaintiff's counsel referred to us to E plethora of authorities in support of his contentions and this included the cases of *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2011] 4 MLJ 85; [2010] 1 CLJ 484; *RHB-Cathay Securities Pte Ltd v Ibrahim Khan and other actions* [1999] 3 SLR 464; *Inter-Pacific Securities SB v Fong Ping Yuen* [1999] MLJU 178; [1999] 1 LNS 206; *Sarawak Securities Sdn Bhd v Andy Chan Chaw Guan; Fabian Eh* F *Ng (Third Party)* [2000] MLJU 406; [2000] 7 CLJ 364.

[21] It was also argued before us by the plaintiff's counsel that the evidence in this case revealed that the defendants were actually aware and condoned the G said share transactions as opposed to merely being ignorant of it. The plaintiff's counsel referred us to the case of *M'Kenzie (Pauper) v British Linen Company* [1881] 6 AC 82.

[22] Learned counsel for the plaintiff further went on to state that the Court H of Appeal was correct in using policy to infer liability on a customer of a stock broking firm when the said customer failed to immediately lodge a complaint to the stock broking firm, upon knowledge of an unauthorised transaction done by the stock broking firm's dealer. The plaintiff's counsel stressed that public policy may be used to impose liability when it was fair, just and I reasonable to do so and where failure, to rely on public policy may cause injury to the public welfare or interest. In reliance thereof the following cases were cited: *Dato' Shazryl Eskay bin Abdullah v Moron Mahawangsa Sdn Bhd & Dato' Yahya bin A Jalil* [2011] MLJU 486; *Majlis Perbandaran Ampang Jaya v Steven Phao Cheng Loon & 81 Others* [2006] MLJU 37.

[23] As for the issue of indemnity the plaintiff's counsel submitted that the defendants' failure to lodge the complaint immediately after coming to know of the unauthorised transactions had resulted in the plaintiff being induced, and further relying on the conduct of the defendants they did suffer losses. The plaintiff's counsel placed heavy reliance on the cases of *Greenwood v Martins Bank, Ltd* [1933] AC 51;*Yoong Sze Fatt, RHB-Cathay Securities Pte Ltd*, *Inter-Pacific Securities SB and Sarawak Securities Sdn Bhd*.

FINDINGS

[24] The questions of law raised in this appeal rests upon the issue of whether the learned trial judge had misdirected herself based on the evaluation of facts and evidence in arriving at her decision. It also raised the issue of appellate intervention on findings of facts by the learned trial judge.

[25] The law on appellate intervention on findings of fact by a trial judge is trite. In this context it may be useful to refer to the case of *Multar v Lim Kim Chet and Anor* [1982] 1 MLJ 184; [1982] CLJ 107 (FC), wherein it was held that an appellate court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty on one party's evidence' — and the consistency of the other party's evidence being disregarded. In the Privy Council case of *Choo Kok Beng v Choo Kok Hoe and Ors* [1984] 2 MLJ 165 it was held that when a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of the appellate court to intervene and correct the error lest otherwise the error results in serious injustice. In *Gan Yook Chin and Anor v Lee Ing Chin And Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC), the Federal Court echoed the following:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely relate to such a process. This is reflected in the Court of Appeal's restatement that a Judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any of the evidence placed before him. The Court of Appeal further reiterrated the principle central to appellate intervention ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.

[26] It is clear to us that the Court of Appeal in this instance was fully aware of the above principle as the court drew strength from the abovementioned pronouncements. Having given this matter their utmost consideration and having anxiously scrutinised the record, the Court of Appeal stated the following:

> We find the argument that Megat Makhtar acted alone without the defendants' instruction or knowledge to be disingenuous …
>
> In this case, Megat Makthar testified for the defendants' and therefore it is the defendants' own evidence that the defendants agreed that the trades be booked under the defendants' accounts. The arrangement was purely between Megat Makhtar and the defendants'.

Based on the foregoing, the Court of Appeal concluded that:

> Having examined the process of evaluation by the learned trial judge, we find that the learned judge did not fully appreciate the evidence before her.

[27] The question before us now is whether appellate intervention is permissible in this case. We would like to emphasise here that this is not a case that involves pure questions of fact founded upon the credibility of witnesses. Rather, it is a case where proper inferences must be drawn based on all evidences fairly admitted by the parties. Having said that we are convinced that as far as evidence goes the learned trial judge took pains to set forth in her judgement to show that there was indeed inconsistency and manifest error in the purported contract notes relating to the unauthorised transactions. It is pertinent to note that this was not only supported by documentary evidence but also further substantiated by the testimonies of the plaintiff's witnesses. The plaintiff's witness, namely, PW1 confirmed that there were material inconsistencies and errors in the contra statements and contract notes. The learned judge based her findings on documentary evidence produced before her namely exhs 'P38', 'D62' and 'D63' which were admission in writing by Megat to say that he used the defendants' account without instructions by way of a 'married deal'. We therefore find that the plaintiff's submission that there was an agreement between Megat and the defendants in carrying out the unauthorised transaction to be misplaced in light of the direct evidence being adduced. We hereby uphold the finding of the learned High Court judge in invoking an adverse inference against the plaintiff under s 114(g) of the Evidence Act 1950 in respect of the plaintiff's failure to tender the fax transmission or telephone recording for the purported transaction which is in dispute.

[28] We are unable to endorse the finding of the Court of Appeal in ruling that the defendants had knowledge of the unauthorised transactions. This is a clear misdirection on the part of the Court of Appeal as the material evidence

recorded clearly shows that the transactions were unauthorised. Our attention was drawn to the notes of proceedings before the learned trial judge and we noticed the following portion of the Megat's Q & A which actually strengthens our stand:

Q57: Rujuk ms 97, Lampiran 44 (Eskhibit P-41). Anda telah mengatakan semasa Domestic Inquiry bahawa 'When the Account was utilised in the first place, it was profitable. This was done with Dato's knowledge'. Sila terangkan maksud pernyataan anda ini samada ia telah dilakukan atas arahan Dato' Azman

A: Saya pohon izin Yang Arif Hakim untuk menerangkannya dalam Bahasa Inggeris. It was done without Dato' Azman's instruction. I bought and sold the shares first in my Clearing Account which resulted in profits. So I approached Dato' Azman and asked him whether I can book the profits under his account which he agreed. Dato' only knew about this profitable transaction after the shares have been bought and sold, not before.

Q58: Seterusnya, anda telah mengatakan semasa Domestic Inquiry bahawa 'Subsequently, the account incurred losses, also with Dato's knowledge'. Sila terangkan maksud pernyataan anda ini samada ia telah dilakukan atas arahan Dato' Azman.

A: No, it was done without Dato's instruction. The buy and sell of shares in this case have been done and booked into Dato's account without Dato's instruction or knowledge. Dato' knew about this when there were losses in his account and complained to me about it.

Q59: Rujuk kepada soalan semasa Domestic Inquiry 'Does the client know about his own trades and losses in the Account? Dan jawapan anda 'Yes, up to a certain extent when the losses amounted approximately RM 45K'. Sila terangkan maksud pernyataan anda ini samada ia telah dilakukan atas arahan Dato' Azman.

A: Yes, Dato' knew about the losses in the account but the transaction was not done with his instruction or approval. Dato' demanded that I rectify the situation.

Based on the above, it is clear from the testimony of Megat that the transactions were not authorised by the defendants and he had infact manipulated the accounts.

Further, we would also like to highlight the testimony of SP1, wherein SP1 in her Q & A stated that:

Q105: Benarkah Megat Makhtar telah dipecat dari jawatannya pada 22 April 1998 oleh plaintiff?

A: Yes, based on the record.

Q107: Saya katakan kepada kamu bahawa Megat telah didakwa atas salahlaku yang serius berdasarkan pengakuan beliau bahawa transaksi yang

menyebabkan kerugian dalam akaun Dato Azman dan Fine Access telah dilakukanya tanpa sebarang kebenaran,

A: Yes

It is clear to us that SP1's testimony fortifies the fact that Megat was dismissed by the plaintiff from his employment for having manipulated the accounts without the first defendant's knowledge.

[29] We are also unable to accept the plaintiff's contentions that the defendants failed to object or question the unauthorised transactions as undisputed facts clearly show that the defendants' were not quiet when they knew of the unauthorised transaction in their trading account. The undisputed facts reveal that the first defendant had indeed met up with the executive director of the plaintiff on the 24 February 1997 and wrote a letter on the 27 February 1997 stating their position on the irregularities in their accounts.

To substantiate the above contention we would like to make reference to the relevant undisputed evidence which had crystallised through the testimony of Dato Azman (DW2) at Q & A Nos 20–23:

Q20: Setelah mengetahui kerugian kontra yang amat banyak pada akhir Januari 1997 adakah kamu membuat tindakan susulan dengan plaintiff?

A: Saya terus berjumpa dengan Pengarah Eksekutif plaintiff pada 24 February 1997 untuk memaklumkan beliau mengenai urusniaga tidak sah yang telah dijalankan dalam akaun saya dan akaun Fine Access.

Q21: Apa berlaku seterusnya?

A: Selepas pertemuan itu, saya susuli dengan surat kepada Pengarah Eksekutif Plaintiff.

Q22: Rujuk ms 67 dan 68, Lampiran 44 (Ekshibit P-34), adakah ini surat yang dimaksudkan?

A: Ya.

In similar breath, Dato Azman took pains to explain the contents of the purported letter at Q & A No 23 as the following:

Q23: Bolehkah anda beritahu Mahkamah kandungan surat anda?

A: Saya mengadu bahawa kedua-dua akaun saya dan Fine Access telah disalahgunakan. Saya juga melampirkan senarai urusniaga yang dibuat tanpa arahan saya. Saya juga mengatakan bahawa hasil jualan daripada urusniaga yang sah telah digunakan untuk menyelesaikan kerugian urusniaga yang dibuat tanpa arahan saya.

Thus, based on the testimony of Dato Azman (DW2); and, substantiated with documentary evidence tendered in court, it is evident that Dato Azman did infact react to the unauthorised transactions.

[30] As for the issue of estoppel, we are of the view that the plaintiff has failed to demonstrate to this court on how the delay in replying to their contra statements as early as year 1996 had encouraged a belief on their part and having relied on that belief the plaintiff had altered their position. To us it is clear that the very essence of an estoppel as envisaged in the case of *Attorney General of Hong Kong And Anor v Humphreys Estate (Queens Gardens) Ltd* [1987] 1 AC 114 (PC) has not been satisfied. Moreover it is pertinent to note that the important provision in the plaintiffs contract note stipulate that:

> Any error must be notified to us by registered letter immediately.

We are of the view that based on the clear provisions of the contract note no time frame had been set out to actually impose the liability on the defendants for delay. Hence we are entirely conscious that the issue of delay in this case is a matter to be treated with severity only in appropriate circumstances. If there was a delay it was adequately explained by the first defendant that he was away overseas from October 1996 to January 1997. Hence, we find delay per se was not enough to create an estoppel in favour of the plaintiff.

[31] To recapitulate, based on the facts and evidence adduced at trial it is clear that there was an unauthorised transaction in the defendants' accounts. We are convinced that after considering the rival contentions of the parties both evidential and by way of argument, the learned trial judge made the abovementioned findings. It is apparent that the learned trial judge did in fact properly evaluate the evidence and asked herself the right questions.

[32] Based on the forgoing we are convinced that the plaintiff had failed to prove their loss, and the defendants in turn had shown that the plaintiff was negligent to allow Megat to misuse the accounts. As a result of this the defendants suffered losses when the plaintiff force sold the shares in the defendants' accounts and utilised the profits to set off the losses incurred from the unauthorised transactions.

[33] In conclusion, may we add that in order to satisfy its obligations, a brokerage firm must show not only that they had in place supervisory and compliance rules and procedure but also that they had effectively implemented and enforced their rules and procedures. Shifting the burden and imposing liability on the innocent trader by reason of unauthorised transactions conducted by their employees will cause substantial harm to the innocent trader. We however say this with caution; save, to the very limited extent to which we have indicated as this clearly depends on the surrounding facts and circumstances of a particular case.

[34] Based on the forgoing reasons, we will answer all the three questions posed to us in the negative. Accordingly the appeal is allowed with costs. The

orders of the Court of Appeal are therefore set-aside. We reinstate the orders of the High Court. We will now invite counsel to address us on the issue of costs.

Appeal allowed with costs, orders of the Court of Appeal set aside and orders of the High Court reinstated.

Reported by Ashok Kumar